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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICUS CURIAE KITSAP COUNTY

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BRIEF FOR AMICUS CURIAE KITSAP COUNTY

STATEMENT OF INTEREST OF AMICUS CURIAE

The Prosecuting Attorney for Kitsap County believes that this appeal raises important questions concerning the right of non-Indian citizens of the United States residing on the Port Madison Reservation in Kitsap County in the State of Washington to be subject to the lawful jurisdiction of the State of Washington. It is the duty of the Kitsap County Prosecutor, an elected official, to enforce the laws of the State of

Washington to their full extent on the Port Madison Reservation. Kitsap County is not now and never has been a party to this suit.

The Port Madison Reservation covers approximately 7,300 acres of land in northern Kitsap County. Less than one percent of the total land area of the reservation is held in trust status by the Suquamish Tribe. Approximately 63 percent of the land area of the reservation is held in non-trust or unrestricted fee patent. Approximately 36 percent of the total land area of the reservation is held by individual Indians in restricted fee status. (R. 53, Map No. 4).

Between 50 and 173 Suquamish Indians are disbursed throughout the Port Madison area, living among 3,000 non-Indian residents on a fee patent reservation. (A. 45, 47, N. 9, *infra*). At least 750 of the residents of the reservation have objected to the exercise of tribal jurisdiction over them by signing a petition. (Appendix A)

STATEMENT OF THE CASE

On August 19, 1973, appellant Mark Oliphant, a non-Indian, was arrested by Suquamish Tribal Police on tribal trust land on the Port Madison Reservation for the offenses of assault and battery and resisting arrest. In August and September of 1973, a petition and a supplement to petition for writ of habeas corpus were filed in United States District Court for the Western District of Washington. The petitions challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over Mark Oliphant.

On October 12, 1974, appellant Daniel Belgarde, a non-Indian, was arrested by Suquamish Tribal Police on fee patent land on the Port Madison Reservation for offenses of injury to public property and reckless endangerment. In December of 1974 the appellant Daniel Belgarde filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. His petition also challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over his person.

The Federal District Court upheld the exercise of criminal jurisdiction by the Suquamish in both cases. The Ninth Circuit Court of Appeals affirmed the holding of the District Court in *Oliphant* v. *Suquamish Indian Tribe* (Appendix, hereinafter A. 55), with Judge Kennedy in dissent. (A. 65).

While the actual exercise of criminal jurisdiction by Kitsap County on the Port Madison Reservation is not determinative of the legal issues raised in this appeal, the law follows reason and experience. In his *Oliphant* opinion, Judge Duniway places great reliance on appellee Suquamish Tribe's inaccurate description of the law enforcement situation on the Port Madison Reservation. Suquamish would have this court believe that it is the Suquamish who have brought law and order to the Port Madison Reservation.

Since criminal penalties are frequently used to support the regulation of business and domestic life through taxation and land use regulation, these cases present issues broader than the maintenance of peace on the Port Madison Reservation. Therefore, Kitsap County is providing this court with a complete picture of the Port Madison Reservation and the breadth of

jurisdiction asserted by 50 Suquamish Indians over approximately 3,000 non-Indian residents of a fee patent reservation. (A. 45, 47).

On July 19, 1977, the Suquamish Tribe held a public hearing as a preliminary step to adoption of an interim land development ordinance.[1] The ordinance makes it unlawful for any person to build any structure upon lands within the boundries of the Port Madison Reservation or to subdivide, plat, or otherwise modify existing land use within the same area for 18 months. It is also unlawful under the ordinance to clear or otherwise modify land located within the Port Madison Reservation for 18 months. The tribal council retains authority to vary the ordinance and allow building on the reservation consistent with the principles of a presently non-existent long range plan.[2] The ordinance makes it a criminal violation for any person to violate the provisions of the ordinance and the penalty for such a violation is $500.00 or six months in jail or both.

The non-Indian residents of the reservation have asked the tribe not to apply its resolution to non-Indian owned land.[3] The residents of the reservation have expressed a concern that the tribe is initiating actions to take over the use of their property, and all public functions such as taxation, schools, roads, water and sewer services on the reservation.[4] The Tribal Chairman, Richard Belmont, in response to those expressed concerns, indicated that the tribe would not be living

[1] Bremerton Sun, July 20, 1977

[2] *Id.*

[3] *Id.*, August 8, 1977.

[4] Seattle Times, July 30, 1977

up to its responsibility if it adopted a land use plan and did not perform all the functions a local government is supposed to perform.[5] The reservation non-Indians are clearly concerned that if total tribal control comes about, they will be subject to taxation without representation.[6]

The status of the land, people, and law enforcement on the Port Madison Reservation do not support the extension of tribal criminal jurisdiction in this case.

The Land.

By the Point Elliot Treaty of 1855 the Suquamish Indians were given 1,280 acres of land near Port Madison, Washington. (R. 54-56) (All references are to the Oliphant record unless otherwise specified). The Secretary of Interior increased the size of this reservation to approximately 7,300 acres in 1864. (R. 53, Map No. 2; R. 54, Exh. 2, 3). However, by 1905, pursuant to certain provisions of the Point Elliot Treaty, the General Allotment Act of 1887, 24 Stat. 388, and a special cession agreement enacted in 1905, 33 Stat. 1048, all but approximately 49 acres of the Port Madison Reservation were either allotted to individual Indians or otherwise disposed of. (R. 54, Ex. 4). The precise effect of these acts on the status of the Port Madison Reservation has been the subject of dispute and confusion for decades. Cf. *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe* v. *Kneip,* 45 U.S.L.W. 4346 (1976). See the discussion of the jurisdictional history of Kitsap County, *supra.* By 1971 there remained only 41 acres of tribal land and approximately 2,600 acres of land owned by in-

[5] Seattle Times, July 30, 1977

[6] Bremerton Sun, August 3, 1977

dividual Indians under a restricted fee. (R. 53, Map No. 4) The remaining 4,600 acres of land was held in unrestricted fee by non-Indians. (R. 53, Map No. 4)

Aside from one area of Indian ownership, the northeastern portion of the reservation was entirely owned by non-Indians who held unrestricted fee patents. (R. 53, Map No. 5) There is no tribally owned land in that portion of the reservation. The town of Indianola is contained wholly within the northeastern portion of the reservation. There is no Indian owned land in the unincorporated town of Indianola. The predominant land use in the northeastern portion of the reservation is rural. Some of the land in Indianalo has been zoned semi-rural.[7]

In the southwestern portion of the reservation the pattern of ownership may be described as checkerboard. Most of the land in the unincorporated town of Suquamish is owned by non-Indians. (R. 53, Map No. 5) The predominant land use in this portion of the reservation is rural. There is also intermediate and urban use[8] of the land in or near the town of Suquamish, including a school, small businesses, homes and undeveloped land.

As of 1971, approximately 63 percent of the land area of the Port Madison Reservation was held in nontrust or unrestricted fee patent. Approximately 36 percent of the total land area of the Port Madison Reservation is held by individual Indians in restricted fee status. Less than one percent of the total land area of the reservation is held by the tribe. (R. 53, Map No. 4)

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[7] Kitsap County Policy Plan Map, 1977

[8] Kitsap County Policy Plan Map, 1977

The People.

While an elderly member of the Suquamish claims that only 50 members of the tribe actually live on the reservation and only 22 are eligible voters in tribal affairs, (A. 46) a 1973 Bureau of Indian Affairs Census indicates that 173 Suquamish Indians live on the Port Madison Reservation.[9] Despite the presence of an additional 227 Klallam Indians on the Port Gamble Reservation in northern Kitsap County, only 2.6 percent of the 14,000 people of northern Kitsap County are Indian.[10] Projected growth estimates reveal that by 1985 there will be approximately 20,000 people living in northern Kitsap County.[11] The total population of Kitsap County is approximately 116,000.[12]

Nearly all retail and service outlets located on the reservation are owned and operated by non-Indians. However, they provide services to Indian and non-Indian alike. There are approximately 42 Indian dwellings located on the Port Madison Reservation. Many of these homes are located on non-Indian land.[13] The Indian population is widely disbursed throughout the reservation. The few who live on the reservation share public facilities, churches and schools with non-Indians who live on the reservation. (A. 40, 46) The majority of tribally owned land has been leased to non-Indian parties who reside on that land and pay State

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[9] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[10] Washington State Board of Education, 1974; Trident Fiscal Impact Analysis, June 1977.

[11] *Id.*

[12] *Id.*

[13] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

taxes for the homes they put on that land. (A. 29) See, *Chief Seattle Properties* v. *Kitsap County*, 86 Wn.2d 7, 541 P.2d 699 (1975).

Most job opportunities for Indian and non-Indian residents of the Port Madison Reservation are and have been located off the reservation. The tribal chairman and both judges of the Suquamish are employed off the reservation by non-Indian employers. Tribal income is limited to law enforcement grants, the profits of a small smoke shop, and an annual income from non-Indian property owners who have built homes on 36 acres of tribal trust land.[14]

The predominantly non-Indian community of Suquamish has organized into two principle organizations: The Suquamish Community Club and Suquamish Emergency Services. The latter organization is made up of volunteer ambulance workers and volunteer firemen. The community club as of 1977 had 260 paid members. The members of these organizations work interchangeably on community affairs. The citizens of Suquamish financed and built a fire station and held rummage sales and auctions to pay $16,000 for a new ambulance and $16,000 toward expansion of the fire station. The residents of Suquamish have also financed and built a boat launching ramp and rebuilt part of the community dock. Other community activities include the support of a Senior Citizens Center, annual highway clean up, and the cutting and delivering of wood to Senior Citizens.[15] Until 1973, Chief Seattle Days was sponsored each year by the American Legion. (A. 46)

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[14] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[15] Letter from Suquamish Community Club, August 3, 1977, on file in Kitsap County Prosecutor's Office.

Kitsap County builds and maintains public roads located on the reservation. Public utility districts have been formed by the citizens of Indianola and Suquamish to provide water to the Indian and non-Indian residents of the Port Madison Reservation.[16] Kitsap County installed and owns the sewer system located on the Port Madison Reservation.

Kitsap County and the State of Washington provide residents of the Port Madison Reservation, non-Indian and Indian alike, with social, health, and educational services. There are no Indian Bureau physicians or nurses residing on the reservation. Private physicians are consulted by Indian and non-Indian alike.[17] Kitsap County also provides alcohol rehabilitation, drug abuse, and mental health counseling services.[18] Kitsap County is presently sponsoring construction of a day care facility for the residents of Kitsap County. The Kitsap County Community Action Program also administers programs and provides a variety of services to low income residents of Kitsap County.[19]

In the 1976-77 school year 3,334 students enrolled in the North Kitsap School District.[20] That school district consists of seven schools located in the North Kitsap

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[16] People and Kitsap, A Data Profile of Kitsap County, October, 1976 from Kitsap County Planning Department.

[17] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[18] People and Kitsap, A Data Profile in Kitsap County, *Ibid.*

[19] *Id.*

[20] Enrollment Records of the North Kitsap School District for 1976-77. There are no Indian schools on the Port Madison Reservation.

Peninsula. By 1985 it is projected that there will be approximately 4,700 students enrolled in the North Kitsap School District. In the 1976-77 school year only 35 Suquamish Indians attended schools in the North Kitsap School District. Suquamish Elementary School, which is the only school located on the Port Madison Reservation, has a 1976-77 enrollment of 184 students. Only 14 of these students are Indians.

Law Enforcement by Kitsap County.

In his majority opinion, Judge Duniway expresses the opinion that the events surrounding Chief Seattle Day showed the need for the exercise of jurisdiction by the Suquamish Tribe. As a matter of law, federal prosecution is available for major crimes under the Major Crimes Act, 18 USC 1153 (1970) and for all other incidents which would be violations of state law off the reservation, through the Assimilative Crimes Act, 18 USC 13 and 18 USC 1152. Either through the Assimilative Crimes Act or through authority conferred upon Kitsap County under Public Law 280, Mr. Oliphant would have been subject to state laws proscribing assault and disorderly conduct, among other charges.[21]

More importantly, it is inaccurate to characterize law enforcement for an entire year on the basis of an incident occurring on one weekend, during the only

[21] If state jurisdiction had been exercised, criminal charges could have been filed against Oliphant, including, Third Degree Assault, RCW 9.11.030; and Disorderly Conduct, RCW 9.87.010; and traffic code violations could have been charged against Belgarde, including: Reckless Driving, RCW 46.61.500; Negligent Driving, RCW 46.61.525; Speeding, RCW 46.61.400. These are all misdemeanors.

major gathering on the reservation for the year. The Kitsap County Sheriff's office does not serve as a private security force for large scale events such as rock concerts and Chief Seattle Days. Despite the large gathering in Suquamish only one arrest was necessary in breaking up one fight between two individuals. (R. 101)

In their return to the Belgarde petition for the writ of habeas corpus, the Suquamish inaccurately characterized an incident in which Mr. Belgarde was driving recklessly as another instance in which no law enforcement would have occurred if the Suquamish Police had not been present. (A. 103) The reports of the Suquamish Police from that incident, (A. 106-109) reveal that the initial contact with Mr. Belgarde occurred at 11:45 p.m. on October 11, 1974. There is no indication in the reports that there was any prior contact as alleged in the Suquamish briefs before the Federal District Court. (A. 94) Neither is there any identification that a report was made to the Kitsap County Sheriff's Office earlier in the evening. Even assuming that such a report was made, there is no indication in the officer's reports what kind of report would have been made, whether or not the nature of the report would have recommended action by the Kitsap County Sheriff's Office, or whether or not action was taken. Any doubt as to the intentions of Kitsap County in enforcing state and local laws on the reservation is resolved by what occurred later in the evening.

The Suquamish Police stopped the defendants, identified them, and arrested them. (A. 108) Once they were advised of the incident, both a Kitsap County Deputy Sheriff and a Washington State Patrol Trooper arrived at the scene to assist in the investigation of

the offense. Despite the fact that Trooper Broome apparently saw none of the defendant's driving activities and did not participate in his arrest, Trooper Broome assisted in the investigation and filled out an accident report concerning the matter.[22] The only reasonable inference that can be drawn from the events of October 11 and 12, 1974, during which the Suquamish Police saw a violation of the law and made an arrest, is that both the Kitsap County Sheriff's Officer and the Trooper from the Washington State Patrol actively assisted in the pursuit of the investigation of a crime occurring on the Port Madison Reservation.

The Kitsap County Sheriff's Office and Washington State Patrol enforce the laws of Kitsap County and the State of Washington on the Port Madison Reservation. The Washington State Patrol maintains in separate cars one to three officers at all times on state highways in North Kitsap County. State Highway 305 passes through the reservation. (R. 53, Map No. 7)

As of August of 1977, the Kitsap County Sheriff's Office employed 75 individuals, 48 of whom are duly commissioned law enforcement officers. Twenty-four hours a day and seven days a week there are usually two and at times one patrol car(s) on duty in Northern Kitsap County which car(s) patrol(s) the Port Madison Indian Reservation, among other areas in Northern Kitsap County. An additional patrol car is on the road as a traffic car which patrols problem areas in Northern, Central and Southern Kitsap County. Detectives of the Kitsap County Sheriff's Office assist in emergency situations and investigate felonies and

[22] In Washington a peace officer may not arrest another for a misdemeanor not committed in his presence. *Kilcup* v. *McManus*, 64 W.2d 771 (1964).

other matters occurring both on and off the Port Madison Indian Reservation. All officers and detectives of the Kitsap County Sheriff's Office are instructed to patrol the Port Madison Indian Reservation and investigate crimes occurring on fee patent land and highways on the reservation. They are also instructed to respond to all calls from non-Indian citizens living on the reservation. The Sheriff has spoken with non-Indian residents of the reservation and advised them to call him if they are dissatisfied with the service they receive from the Sheriff's Office.[23]

While statistics concerning law enforcement activities of the Kitsap County Sheriff on the Port Madison Reservation are not separately recorded, statistics for the entire County show the Sheriff's Office to be an effective law enforcement agency. The 1975 Kitsap County Regional Criminal Justice Plan reveals that the Sheriff's Office cleared offenses investigated by arrest at or better than the national average.[24] Comparisons in the same Criminal Justice Plan reveal that the Kitsap County Sheriff personnel are better trained than their counterparts on the reservation, the Suquamish Tribal Police.[25]

Criminal activity on the reservation is not a significant problem.[26] Most crime occurring in Kitsap County takes place in South or Central Kitsap County,

[23] Statement of Art Morken, Kitsap County Sheriff, February 24, 1977, June 25, 1975.

[24] 1975 Kitsap County Regional Justice Plan, Program Planning & Grant Administration, Bremerton, Washington, pages 145, 152, 157, 171.

[25] *Id.*, at pages 55, 60.

[26] See, Statement of Sheriff Art Morken, Bremerton Sun, July 3, 1975.

particularly in or near the two largest cities of Kitsap County, Bremerton and Port Orchard.[27] Kitsap County District Courts have jurisdiction over minor civil controversies and misdemeanors and gross misdemeanors for which the sentence imposed does not exceed one year or a $1,000.00 fine. Criminal offenses occurring on the Port Madison Reservation are filed either in District Court Two in Port Orchard which is 30 miles from the reservation, or, as is usually the case, in District Court Two-North in Poulsbo which is five miles from the reservation. All traffic offenses occurring on the reservation are filed in District Court Two-North.

Court records reveal that Kitsap County District Court Two-North is an active forum for the enforcement of criminal and traffic violations in the north end of Kitsap County. In 1976, 1,970 traffic cases were filed in that court and 209 criminal cases were filed in the same justice court.[28] Thirty-two civil matters were also heard during that time period. That court is available to and used by Indian and non-Indian alike.

While District Court Two in Kitsap County does not record statistics concerning criminal and traffic violations occurring on the Port Madison Reservation, this writer is personally familiar with cases arising on the reservation and prosecuted in District Court in Kitsap County. Indian and non-Indian alike respond to the criminal process of the state on this reservation.

In the *Oliphant* brief of the Suquamish before the Ninth Circuit Court of Appeals, the tribe has drawn general conclusions concerning the reluctance of County Prosecutors to prosecute non-Indians for minor offenses occurring on reservations. The Suquamish also relate that traffic offenses, hunting and fishing violations and other minor criminal offenses committed by non-Indians on Indian reservations go unpunished. Judge Duniway in his majority opinion in *Oliphant* apparently relies quite heavily on this characterization of law enforcement on the reservation. He quotes this entire section of the Suquamish brief at the end of the majority opinion. (A. 63-64)

[27] 1975 Kitsap County Regional Justice Plan, *supra* at page 100.

[28] These figures were obtained by adding the figures contained in the 12 monthly reports for 1976, submitted to the Court Administrator for the State of Washington.

These general conclusions do not apply to the Port Madison Reservation. In the Kitsap County Prosecutor's Office, the laws of the State of Washington and Kitsap County are enforced with very little plea bargaining. That policy has been favorably reviewed by a recent Washington State House of Representative's Judiciary Committee Staff Survey.[29] Where non-Indians commit crimes on the reservation, it is the policy of the Prosecutor's Office to prosecute such defendants. While statistics concerning Kitsap County's law enforcement activities on the reservation are not separately reported, this writer is personally familiar with incidents occurring on the reservation and prosecuted in District Court Two and District Court Two-North. The nature of charges filed in two recent incidents demonstrates that the Prosecutor's Office does not regard crimes occurring on the reservation as unworthy of its attention.

In *State of Washington* v. *Kris Espelund,* Cause No. C-1024N, filed in October of 1976, the defendant was charged with criminal trespass in the second degree, a misdemeanor punishable by a maximum fine of $500.00

[29] See, Report concerning this policy in October 25, 1976, Bremerton Sun.

and a maximum jail sentence of ninety days. The defendant and complaining witness had exchanged horses with each other. None of the parties involved were Indians. All of the parties resided on fee patent land on the Port Madison Reservation. The defendant became unhappy with the exchange and sought to recover her original horse. Since the defendant had to pass through two fences at the complaining witness' residence to obtain her original horse, and since she was not given permission to do so, she was charged with criminal trespass.

In *State of Washington* v. *Stanley Swearingen,* Cause No. C-5-16N, charges of disorderly conduct and resisting arrest were filed against the defendant in May of 1976. In that case all of the parties and property involved were non-Indian. The defendant, a resident of Suquamish, became intoxicated one evening and went to a party at another residence in Suquamish. The defendant became involved in a fight, blows were exchanged, and the Sheriff's Office was called. Contact by Sheriff's Officers at the scene of the incident resulted in additional charges of resisting arrest.

In a prosecution arising from an incident occurring prior to Kitsap County's entrance into this case as an amicus curiae, that is, in March and April of 1975, a non-Indian defendant made harrassing telephone calls to his non-Indian wife, who lived on her own property on the Port Madison Reservation. *State of Washington* v. *Leonard Asher,* C-4742. The complaining witness and defendant's ex-wife called both the Suquamish Tribal Police and the Kitsap County Sheriff's Office concerning these calls. Officers from both police forces initially responded to these calls. On subsequent occasions, the complaining witness' calls

were referred to the Kitsap County Sheriff's Office by the Tribal Police. At that time the Suquamish Tribal Police Officers indicated that it was their policy to refer complainants in cases not involving Indians and not involving Indian property to the Kitsap County Sheriff's Office. The defendant was charged with making harrassing phone calls pursuant to RCW 9.61.230, a misdemeanor. There is not an equivalent crime for making harrassing phone calls in the Suquamish Tribal Code.

State authority to regulate Indian and non-Indian hunting and fishing on and off Indian reservations is subject to numerous restrictions. See, *United States* v. *Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), aff'd. 520 F.2d 676 (9th Cir. 1075). Nevertheless, the Kitsap County Prosecutor's Office has been one of the most successful in the State of Washington in prosecuting such violations.[30]

Law Enforcement by the Suquamish Indian Tribe.

Prior to 1973, the Suquamish Indian Tribe had never adopted a Law and Order Code. A former chairman of the tribe recalls that since 1940 until the end of her chairmanship in the latter part of the 1960's there had never been any discussion by members of the tribe concerning passage of laws to control the conduct of any person on the Port Madison Indian Reservation. (A. 44) Prior to 1973, the Suquamish Tribe employed no tribal police and enforced no laws on the Port Madison Reservation.

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[30] See, letter from Acting Director of Department of Fisheries to Kitsap County Prosecuting Attorney, May 6, 1977, on file in the Kitsap County Prosecutor's Office.

Prior to the 1973 attempt by the tribe to exercise criminal jurisdiction over Petitioners, and prior to Public Law 280 in 1957, only Kitsap County, not the tribe or the federal government, exercised criminal jurisdiction over Indians and non-Indians alike on all public highways and on all fee patented lands throughout the Port Madison Reservation.

The Constitution and bylaws adopted by the Suquamish Tribe on July 2, 1965, under the Indian Reorganization Act of 1934, limited membership in the Suquamish Indian Tribe to persons of Suquamish Indian blood or their descendants. To serve on the tribal council or general council, to vote in any election, or to participate in tribal meetings, one must be a member of the Suquamish Tribe. (R. 54, Exh. 7).

The Suquamish Law and Order Code claims jurisdiction over all property and persons found within the historic boundaries of the Port Madison Reservation. However, to qualify to become a judge of the Suquamish Tribal Court or Court of Appeals, one must be a tribally recognized member of the Suquamish Tribe. The Law and Order Code does not purport to be a traffic code and does not provide for traffic offenses. It provides for numerous criminal and civil proceedings. However, Kitsap County Superior and District Courts fulfill most of these functions for residents of the Port Madison Indian Reservation. Since the code was enacted in 1973, the Suquamish Tribal Court of Appeals has never convened; no jury trial has ever been held by the Suquamish Tribal Court; the tribal court has consumated no marriages, ended no marriages, it has heard no adoption proceedings, no paternity or child support actions; it has heard no probate, estate or descent in

distribution matters.[31] By recent adoption of Resolution No. 76-065, the Suquamish Tribe amended the 1973 Law and Order Code to allow all Suquamish Tribal members, regardless of residence on or off the reservation, to serve as jurors in the Suquamish Tribal Court and to establish that only Suquamish Tribal members are eligible to serve as jurors in the same court. The Bureau of Indian Affairs' records reveal that in 1975 and 1976 no civil cases were filed in the Suquamish Tribal Court.[32]

The Suquamish Indian Tribe does not have jail facilities on the reservation. It contracts with municipalities for the use of their jail facilities. (A. 13) The tribe also lacks probation or parole facilities and does not currently employ probation or parole officers.[33] The tribe currently employs four police officers who share one police car.[33]

On July 1, 1975, non-Indian residents of the Port Madison Indian Reservation objected to the exercise of criminal jurisdiction by the Suquamish Tribal Police over non-Indians. As a result of that reaction, Tribal Chairman Richard Belmont indicated that he would let the Sheriff handle law enforcement on fee patent lands.[34] Bureau of Indian Affairs' reports indicate that in 1975 no criminal offenses were charged in

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[31] Interview with Grace Duggan, Chief Judge of the Suquamish Tribal Court, Cecelia Hawk, Associate Judge of the Suquamish Tribal Court, Natalie Rudolph, Suquamish Tribal Court Clerk on August 3, 1977.

[32] Annual Reports, Department of the Interior, Bureau of Indian Affairs, Portland Area, Port Madison Reservation, Western Washington Agency, 1975, 1976; Part IX of each annual report.

[33] Interview with Duggan, Hawk & Rudolph, note 31, *supra*.

[34] Kitsap County Herald, July 9, 1975.

the Suquamish Tribal Court.[35] The same report reveals that there were seven accidents investigated in 1975 and no offenses charged as a result of those accidents.[36] The Bureau of Indian Affairs' report of 1976 reveals that only Indians were charged with criminal offenses under the Suquamish Tribal Law and Order Code.[37] The same sources indicate that there was a total of 132 offenses committed in 1976, none involving an arrest for driving while under the influence or other traffic offenses.[38]

SUMMARY OF ARGUMENT

American Indian Tribes are political entities which have always exercised a personal form of sovereignty. Memo. Sol. I.D., April 27, 1939. Therefore, we must beware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. *Id.* If Indian self-government is expanded beyond the personal form of sovereignty to a territoriality, then it must inevitably yield to the sovereign of the soil. *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543.

To the extent that any greater rights have been recognized, they exist at the license of Congress. *See,* Martone, 51 Notre Dame Lawyer 600. States retain sovereign powers over their territory, and reservations are considered to be parts of the surrounding state in which they are located except as forbidden by federal law. *Kake Village* v. *Egan,* 369 U.S. 60, 72.

Congressional policy making through Indian treaties, the Trade and Intercourse Acts, the Major Crimes

[35] Department of Interior Report, *supra,* note 32, Part VI.

[36] *Id.* at Part VII.

[37] *Id.* at Part IV.

[38] Department of Interior Report, *infra,* note 32, Part IV, VA.

Act, the Indian Reorganization Act, Public Law 280, and the Indian Civil Rights Act has always been consistent with the limitation of tribal powers of self-government to jurisdiction over Indians. The mere use of the treaty power did not confer upon the tribes the status of international sovereigns. Cayuga Indian Claims Case, Nielson Report, 203, 307. While early in our constitutional scheme some Indian tribes were granted powers over non-Indians, the prevailing policy at all times in the nineteenth century was to not allow jurisdiction to Indian tribes over non-Indians. 7 Opinion Attorney General 174, 179. The guarantee of the exclusive use of lands made to Indians, conferred no general governmental powers which reach non-Indians. *Kake* v. *Egan, supra.*

Throughout the history of the Trade and Intercourse Acts Congress consistently denied jurisdiction to Indians over non-Indians. *Ex Parte Mayfield,* 141 U.S. 107. See, Clinton, 18 Ariz. Law. Rev. 503, 526-527. The grandest attempt to confer such jurisdiction to tribes over non-Indians, the Western Territory Bill, was defeated for the very reason that it created concurrent jurisdiction. Register of Debates, Volume 10, Part 4, 23rd Cong., 1st Sess., page 4771. The Interior Department maintained a consistent policy of denying tribes jurisdiction in criminal matters over non-Indians. 77 I.D. 113, 115.

Congress even chose to intrude into traditionally intratribal matters by passing the Major Crimes Act in 1885. While that act did not allow jurisdiction in Indian tribes over non-Indians, nonetheless, Congress and the court have excluded tribal jurisdiction. *Sam* v. *United States,* 385 F.2d 213, 214 (10th Cir., 1967).

The Indian Reorganization Act was intended to stabilize tribal organizations, not to confirm self-government on the basis of inherent sovereign rights. Schaab, 8 Nat. Res. Jl. 303, 309-312. With the incorporation of American Indians into our political system as citizens, Act of June 2, 1924, 43 Stat. 253, the Indian Reorganization Act can be seen as a logical step toward fuller participation for Indians in our constitutional framework. Tribal institutions which were bolstered by the Reorganization Act have for all practical purposes become arms of the federal government. *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir., 1965); *U.S.* v. *Wheeler,* 545 F.2d 1255 (1976). The passage of Public Law 280 is also consistent with this traditional limitation of tribal powers of self-government to jurisdiction over Indians. The act clearly did not confer additional powers upon the tribes. It removed federal jurisdiction to allow the reimposition of state jurisdiction over Indians and Indian lands. *Anderson* v. *Gladden,* 188 F.Supp. 666, aff'd 293 F.2d 463 (9th Cir., 1961), cert. den. 368 U.S. 949 (1961). If there remained any vestige of territorial power in tribes over non-Indians, Public Law 280 denied that jurisdiction to them. *U.S.* v. *Burland,* 441 F.2d 1199, 1202 (1971).

Even with the passage of the Indian Civil Rights Act, which guaranteed certain rights to Indian and non-Indian alike, Congress understood that tribal courts lack jurisdiction over non-Indians. 114 Cong. Rec. 9552-53; 113 Cong. Rec. 11473.

The very values most persuasive toward maintaining tribal self-government make inappropriate the extension of tribal governmental jurisdiction to non-Indians.

ARGUMENT

I.

AMERICAN INDIAN TRIBES ARE POLITICAL ENTITIES WITH LIMITED POWERS OF SELF-GOVERNMENT WHICH DO NOT INCLUDE JURISDICTION OVER NON-INDIANS. STATES RETAIN SOVEREIGN POWER OVER INDIAN RESERVATIONS EXCEPT TO THE EXTENT CONGRESS PREEMPTS THE EXERCISE OF THAT SOVEREIGN POWER

Underlying the abstract legal claim of jurisdiction by Indian and non-Indian political entities is a fundamental conflict. All citizens of the United States are guaranteed a republican form of government, Article 4, Section 4 of the United States Constitution, resting upon the consent of the governed and operating through representative institutions. See, Corwin, *Understanding the Constitution,* 4th Edition, 1967, 94-95. The exercise of tribal governmental power over non-Indians, if allowed to take place, would be a clear exception to that principle. It is inappropriate for Indian tribes to exert general governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government but for the accident of their race. But, of course, it would frustrate the whole purpose of allowing Indian self-government to require them to allow non-members also to participate in their self-government. Once participation has opened up beyond the Indian people themselves, their governmental unit has abandoned its very purpose for existing—to allow Indians to make their own laws and be governed by them. Once political participation is extended beyond Indians themselves, there is literally no reason for having Indian government separate from political subdivisions of the state. See, American Indian Policy

Review Commission, Minority Report of Congressman Lloyd Meeds, 1977.

Similarly, it would further frustrate Indian self-government if Indian courts were required to conform closely to the substantive and procedural safeguards of state and local courts. To keep tribal courts essentially Indian in character, tribal values must be weighed against Anglo-American ideas of individual rights."[39]

Non-Indian courts have complex procedural systems designed to show correct and fair decision-making with appellate review to assure uniformity in decision-making and minimize the possibility of bias or error in individual cases. However, Indian tribal courts have very few of these complex assurances of fairness and accuracy in decision making. Few tribal judges are trained in the law of the states and of the United States, and few tribes have systems of appellate review.

The very values most persuasive toward maintaining tribal self-government make inappropriate the extension of tribal governmental jurisdiction to non-Indians. Indian tribal courts are created to regulate Indian affairs among the Indians themselves.

The solicitor for the Interior Department considered the nature of this power of self-government in an administrative ruling concerning the powers of an Indian court over the acts of Indians on unrestricted lands within an Indian reservation. In that opinion it was observed:

[39] See, Equal Protection under the Indian Civil Rights Act, 90 Harv. L. Rev. 627 (1977).

> If, on the other hand, the Indian courts are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. We must therefore beware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. Memo. Sol. I.D., April 27, 1939, as reported in Cohen, Federal Indian Law, 1942, at 360.

This view of Indian self-government is consistent with the holding of federal courts that Indian courts may not exercise jurisdiction over non-Indians. *Ex parte Kenyon,* 14 Fed. Cas. 353 (No. 7720 W.D., Ark. 1878); Accord, *Ex Parte Morgan,* 20 Fed. 298 (W.D. Ark. 1883). American Indian policy observed this distinction throughout the nineteenth century. In *Ex parte Mayfield,* 141 U.S. 107 (1891), the Supreme Court of the United States reviewed certain criminal statutes and treaty provisions to conclude:

> The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversy between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 141 U.S. 117.

A. Indian Tribes Are Not Foreign States: Indian Reservations Located Within the Territorial Limits of States Are Considered Within The Jurisdictional Limits of The States.

When first confronted with the issue of the nature of Indian title, the Supreme Court of the United

States held that reservations were held for the use of Indians, but title to those lands was paramount in the state. *Fletcher* v. *Peck,* 10 U.S. (6th Cranch) (1810). In *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), Justice Marshall observed that the Indians were the rightful occupants of the soil with a legal and just claim to retain possession of it; however, he further observed that:

> Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. *Id.* at 574.

Justice Marshall went on to hold that Indian tribes lacked the power to transfer absolute title to others. This is still the holding of the United States Supreme Court. See, *Tee Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955).

In *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831), a Cherokee tribe sought to restrain the state from applying its laws in Cherokee lands. The tribe attempted to interpose the treaty with the United States to avoid the application of state law to the Cherokees. *Id.* at 15. Chief Justice Marshall began by looking at the jurisdiction of the Supreme Court under Article 3 of the Constitution to find that unless the Cherokees were a foreign state under that article, the Court had no jurisdiction to hear the suit. He concluded that the Indian territory is a part of the United States considered within the jurisdictional limits of the United States. *Id.* at 20. He then observed that the Indians occupied a territory to which the United States asserted a title independent of their will and

that an Indian tribe is not a foreign state under the constitution. *Id.*

Chief Justice Marshall then observed in dicta that the Indian tribes of 1831 who lived within the acknowledged boundaries of the United States are not foreign nations; however, ". . . they may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian." *Id.*

Justice Baldwin observed in his concurring opinion: ". . . judicial power cannot divest the state's rights of sovereignty, and transfer them to Indians, by decreeing them to be a nation, or foreign state, preexisting and with rightful jurisdiction and sovereignty over the territory they occupy." *Id.* at 49.

In his concurring opinion, Justice Johnson observed that the sovereign rights of the Indian tribes were taken by Great Britain upon the first taking of possession of the Indian country and their sovereignty had since never been recognized as in them, otherwise then as dependent upon the will of the superior. *Id.* at 26. Justice Johnson went on to compare the condition of the Indians as Israelites:

> Their condition is something like that of the Israelites when inhabiting the deserts. Though without land they can call theirs in the sense of property, their right to personal self-government has never been taken away from them; and such a form of government may exist though the land

> occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. *Id.* at 27.

The *Johnson* and *Cherokee Nation* opinions stand for the proposition that Indian tribes are not foreign states and whatever sovereignty they originally maintained was necessarily diminished; the United States took exclusive title to the lands occupied by Indians. These propositions are inconsistent with the retention of an inherent sovereignty which would extend general governmental powers over non-Indian residents of an Indian reservation.

The slender reed upon which the Suquamish rest their claim of inherent independent sovereignty is Chief Justice Marshall's opinion in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). A non-Indian missionary was convicted of violating a Georgia statute which regulated who could live in Indian country. Chief Justice Marshall stated that power, war, and conquest give rights which after possession are conceded by the world. He noted that prior to the Revolution, the King of England had never intruded in internal affairs of the Cherokees, "or interfered with their self-government, so far as respected themselves only." *Id.* at 547. The Chief Justice then reviewed the treaty of Holston which he found to still be in effect and concluded that that treaty explicitly recognized the national character and right of self-government of the Cherokees. *Id.* at 556. It was in this context that he went on to point out that the Cherokee nation was a distinct community, occupying its own territroy, with boundaries in which the laws of Georgia could have no force.

Chief Justice Marshall's broad dictum on Indian sovereignty was a response to a state's attempted invasion of tribal privileges as express federal sanction. The term sovereignty is frequently a veil used where the issue is one of federal preemption of regulation in the field of Indian affairs. See, Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License? 51 Notre Dame Lawyer 600, 627-631 (1976).

In his concurring opinion Justice McLean agreed with the Chief Justice that Georgia could not extend its jurisdiction in that case. Justice McLean observed that the residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty until recently. The reason it is not incompatible, he pointed out, is that sovereign powers were expressly conferred upon the federal government to regulate intercourse with the Indians. *Id.* at 592. He further observed that Indian tribes might become so degraded or reduced in numbers as to lose the power of self-government. At that point the exercise of state power would be proper. He concluded:

> So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government within the limits of the state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional. So long as federal power to regulate intercourse with the Indians is exercised, it cannot be obstructed by the state. *Id.*

Justice McLean's opinion foreshadows the modern tendency to look at the applicable treaties and statutes

to define the limits of state power, rather than to rely on platonic notions of Indian sovereignty. See, *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973).

Fourteen years later, the Supreme Court took a view different from that expressed by Justice Marshall in *Worcester*. In *United States* v. *Rogers*, 45 U.S. (4 How.) 566 (1846), a non-Indian adoptee of the Cherokee tribe had murdered another adoptee of the same tribe. In his opinion Chief Justice Taney pointed out that all Indian lands within the United States belong to the United States and not to the tribes, and that the land had only been assigned to them by the United States, "... as a place of domicile for the tribe (which) they hold and occupy ... with the assent of the United States, and under their authority." 45 U.S. at 571. The Chief Justice went on to observe that European governments had not acknowledged Indian tribes to be independent nations, but rather, had divided up the continent, "as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control." 45 U.S. at 571. Finally, he observed:

> We think it too firmly and clearly established to admit a dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may by law punish any offense committed therein, no matter whether the offender be a white man or Indian. 45. U.S. at 472.

The Supreme Court's treatment of ownership of Indian lands was consistent with Indian ideas of owner-

ship. The Indian's land could not be subjected to fixed personal ownership, purchase or sale, but rather was thought of in terms of family use, ownership or lineage use ownership. Land was not conceived of in terms of individual private ownership and exclusive possession because Indians decided to stress communal interests in sharing. Congress had expressed its awareness of the nature of Indian ideas of property when it considered the Removal Acts of 1830. H. Rep. No. 227, 21st Congress, First Sess., Ser. 200 at page 12. In House Report 227, at 7, it was observed that Indian tribes had no idea of a fixed property in lands before the partition of the country by the European nations. They did not have any conception that lands could be the subject of barter, until they were taught by the white man to so regard it. The Indians were a mobile people to whom the whole country was a common hunting ground for all Indians. Even when reservations were created within the boundaries of the provinces, before the Revolution, and the states, after it, the crown, proprietors of provinces, and states have all asserted the exclusive right, in themselves, to extinguish the title to lands reserved to the Indians, until the Constitution was adopted. *Id.* at page 6. After that time, the federal government has acted upon the same principle. *Id.*

B. States Retain Sovereign Power Over Indian Reservations Except to the Extent that Congress Acts to Prevent the Exercise of that Power

Indian tribes exert what has been characterized as merely a purposive, in contrast to general and territorial, tribal self-government. American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977. Tribal self-government is limited to government of members of the tribe and does not

extend to non-members who reside within the reservation. If Indians had inherent sovereignty, they would be free from state law even in their dealings with non-Indians. Such is clearly not the case. In *United States* v. *McBratney,* 104 U.S. 621 (1881), the Supreme Court held that Colorado had jurisdiction over a non-Indian who killed a non-Indian on the reservation. Although a treaty between the United States and a tribe called for federal jurisdiction, the act of Congress admitting Colorado to the United States contained no such provision, and under the rule of the *Cherokee Tobacco,* 78 U.S. (11 Wall.) 616 (1870), the statute repealed the treaty.

The notion of sovereignty expressed in dicta in *Worcester* v. *Georgia,* has changed considerably, as has the condition of the tribes. In *Kake Village* v. *Egan,* 369 U.S. 60, 72 (1962), the Supreme Court traced this erosion. The general notion

> . . . that an Indian tribe is a distinct nation within whose boundaries state law cannot penetrate, has yielded on closer analysis when confronted with diverse concrete situations. By 1880, the court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of a surrounding state or territory except as forbidden by federal law. *Id.* at 72.

See, *Surplus Trading Company* v. *Cook,* 281 U.S. 647, 650-652 (1930).

The nature of state authority over Indian affairs was considered in *United States* v. *Kagama,* 118 U.S. 375, 379 (1886). There the court concluded that Indians are within the geographic limits of the United States and under the political control of either the government of the United States or of the states of the union since

there exists only two sovereign entities in the United States. The Court also concluded that the federal power over Indians must exist in federal government because it never existed anywhere else. But see *Anderson* v. *Gladden,* 188 F.Supp. 166, aff'd., 293 F.2d 463 (9th Cir. 1961) as to the constitutional basis for the federal power.

As early as 1832, Justice McLean had recognized the true nature of federal power in *Worcester* v. *Georgia.* There he concluded that so long as federal power to regulate intercourse with the Indians is exercised, it cannot be obstructed by the state. 31 U.S. 592.

The nature of the federal government's preemption in the area of Indian affairs was explored in *United States* v. *McGowan,* 302 U.S. 535 (1938). In *McGowan* the United States sought forfeiture of automobiles used to carry intoxicants into what the United States characterized as Indian country. The court found that the area in question was Indian country and that forfeiture was appropriate. The court went on to consider whether or not the federal prohibition against taking intoxicants into Indian county deprived the State of Nebraska of its sovereignty over the area in question. The court held:

> The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.

More recent authority in the Supreme Court of the United States has focused its analysis of Indian cases

on this doctrine of federal preemption, rather than inherent Indian sovereignty:

> The trend has been away from the idea of inherent Indian sovereignty as a part of state jurisdiction and toward a reliance on federal preemption . . . the modern cases thus tend to avoid a reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973).

Recent authority also supports the characterization of Indian tribes as having only limited powers of self-government, rather than independent and inherent sovereignty. In *United States* v. *Mazurie,* 419 U.S. 554, 557 (1975), the court held that Congress has the power to regulate the sale of alcoholic beverages in Indian country and that Indian tribes are entities "... which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life..." such that Congress could constitutionally delegate its own authority to the tribe. The Court specifically set aside the question of whether or not the tribe's independent authority justifies imposition of an ordinance which would effect non-Indian conduct on non-Indian land within the reservation. *Id.*

It has been clearly held that state law applies to non-Indians on a reservation and the states may even require a tribe to implement state law as to non-Indians. *Moe* v. *The Confederated Salish and Kootenai Tribes of Flathead Reservation,* 96 S.Ct. 1634, 1645-46 (1976). This holding is certainly inconsistent with a belief that Indian tribes retain the status of "domestic dependent nations", as they were characterized by Justice Marshall in *Cherokee Nation* v. *Georgia, supra.*

Finally, there are constitutional objections to the subjection of non-Indians to tribal jurisdiction. In *Reid* v. *Covert,* 354 U.S. 1 (1957), the Supreme Court held that Congress may not under its power to make rules for the government and regulation of the land and naval forces subject civilians to criminal trial in military courts because such civilans are entitled to be tried in Article III Courts. Accord, *Kinsella* v. *U.S. ex rel. Singleton,* 361 U.S. 234 (1960); compare, *Callahan* v. *Parker,* 395 U.S. 258 (1969). There should be far less authority for Congress to allow criminal jurisdiction over non-Indians in non-Article III courts operating within the boundaries of states.

II.

CONGRESSIONAL POLICY MAKING THROUGH INDIAN TREATIES WAS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

The mere use of treaty-making power does not in itself confer the status of international sovereign entity upon Indian tribes. See, Higgins, International Law Considerations of the American Indian Nations by the United States, 3 Ariz. L.Rev. 74, 79 (1961). International tribunals have denied American Indian tribes international status. Cayuga Indian Claims case (*Great Britain* v. *United States*), Nielson Report, 203, 307 (1936). Although doubtful provisions of treaties are usually construed in favor of Indians, treaties do not otherwise have an exalted status; they may be repealed by subsequent statutes. The *Cherokee Tobacco,* 78 U.S. (11 Wall.) 616 (1870).

In Argument I, page 15, 16, 18, *supra,* it was established that tribal powers were of a personal rather

than territorial and general governmental nature. The prevailing policy at the time of the Point Elliott Treaty was to not allow jurisdiction to Indian tribes over non-Indians. Most of the treaties between the United States and various Indian tribes entered into before 1800 did not allow jurisdiction over non-Indians by Indian tribes. See, Treaty with the Cherokees, 7 Stat. 18 (1785); Treaty with the Creeks, 7 Stat. 35 (1790). In a few of the earlier treaties, Congress had specifically provided for Indian jurisdiction over non-Indians, Treaty with the Cherokees, 7 Stat. 39 (1791). The few treaties that did grant such jurisdiction did so *expressly* and merely followed the practice accepted with respect to international treaties. Later treaties did not allow for tribal jurisdiction over non-Indians. Treaty with the Sacs and Foxes, 7 Stat. 84 (1804) (required the tribe to make complaint to the superintendent); Treaty with the Quapaws, 7 Stat. 176 (1818) (superintendent to punish white who injured Indians as if the injury had been done to a white man). The fairly standard clause on criminal jurisdiction in the 1820's can be found in the Treaty with the Soune and Qualla, 7 Stat. 252 (1825):

> . . . for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the injured party, to the superintendent or agent of Indian affairs . . . and it shall be the duty of said chiefs, upon the complaint being made as aforesaid, to deliver of the person or persons, against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And, in like manner, if any robbery, violence or murder, shall be committed on any Indian or Indians belonging to the said bands, the person or persons so offending shall be tried, and if found guilty shall be punished in like manner as if the injury had been done to a white man.

An opinion of the Attorney General of the United States, issued the same year in which the Treaty of Point Elliot was signed, describes negotiations which considered whether or not the Choctaws would have jurisdiction over non-Indians:

> The Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws any white man who shall come into the nation, and infringe any of their national regulations (Article 4). But Congress did not acceed to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. See Act of June 30, 1834, IV Statutes at Large, page 729, and Act of June 17, 1844, V Statutes at Large, page 680. These acts cover, so far as they go, all crimes except those committed by Indian against Indian. 7 Opinion Attorney General 174, 179 (1855).

The contemporary refusal to grant other Indian tribes this very power over non-Indians indicates that the federal government did not consider such power an inherent attribute of tribal sovereignty. Absence of such an empowering provision in the Treaty with the Suquamish raises a strong inference that Congress did not intend them to exercise such jurisdiction.

In its Ninth Circuit *Oliphant* Brief, the Suquamish point to Article 2 of the Treaty of Point Elliot which provides that white men are not to be permitted to reside upon the Port Madison Reservation without the permission of the tribe and of the superintendent or agent. The Suquamish conclude from this provision that the right to exclude necessarily imparts general

governmental powers to the Suquamish Indian Tribe over non-Indians. The power of exclusion does not impart such powers to the tribe. Although the treaty originally guaranteed the exclusive use of those lands to the Indians, this exclusivity is no longer a fact, due to events and subsequent acts of Congress. With respect to the remaining Indian lands, although the tribe is more than a mere private landowner, *United States* v. *Mazurie, supra,* mere ownership of lands does not give rise to governmental powers. See, American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977. Governmental powers have as a source the State and Federal Constitutions. As has been earlier pointed out, but for the exercise of congressional power, Indian reservations are subject to the governmental power of the states in which they are located. *Kake* v. *Egan, supra,* In *Egan,* the distinction between proprietary and governmental interests was recognized. In *Egan* the Supreme Court held that provisions such as that in the Washington Constitution, which disclaim property interests and declare that Indian property shall be and remain under the absolute jurisdiction and control of the United States, disclaim only right and title of the state of proprietary rather than governmental interests.

Furthermore, the tribe only exercises the power to exclude to the extent that Congress has granted that power to the tribe. The tribal power to exclude non-Indians from reservations has been limited by the due process provisions of the Indian Civil Rights Act. 24 USC 1302 (8).

As early as 1817 Andrew Jackson had written to President Monroe concerning the absurdity of dealing with Indian Tribes through treaties: "I have long

viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging, then it is not absurd for the sovereign to negotiate by treaty with the subject." Basset, Correspondence of Andrew Jackson as quoted in Higgins, American Indian Nations, *infra* at page 26.

By 1869 even the Commissioner for Indian Affairs, Ely S. Parker, himself a Seneca Indian, concluded that treaty making with Indians gave them a false impression of their constitutional status and that treaty making should be ended. See, Annual Report of Commissioner of Indian Affairs, December 23, 1869.

Whatever inference may have been raised with respect to tribal sovereignty by the use of a treaty power by the United States, it was negated by the action of Congress on March 3, 1871, at which time Congress proclaimed that: ". . . hereafter no Indian nation or tribe within the territory of United States shall be acknowledged as an independent nation, tribe or power with which the United States may contract by treaty . . ." 16 Stat. 566.

III.

THE LEGISLATIVE HISTORY OF THE TRADE AND INTERCOURSE ACTS IS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

In *Ex Parte Mayfield,* 141 U.S. 107 (1891) the Supreme Court reviewed the Trade and Intercourse Act, 18 USC 1152, in its predecessor form:

> The policy of congress has evidently been to vest in the inhabitants of the Indian country such

> power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy, and to consture the acts of legislative authority in consonance therewith. The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

The Trade and Intercourse Acts were first adopted in temporary form and renewed in 1790, 1793, 1796, 1799 and the first permanent enactment occurred in 1802. Act of July 22, 1790, 1 Stat. 137; Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat 743; Act of March 30, 1802, 2 Stat. 139. Each of the successive acts addressed non-Indian conduct in Indian country and controlled such conduct by placing jurisdiction for offenses committed under the respective acts in ". . . the Superior Courts in each of the said territorial districts, and the circuit courts, and other courts of the United States with similar jurisdiction in criminal causes . . ." 1 Stat. 331, 473, 747; 2 Stat. 144. Although trials under these acts were to be held in federal courts, some of the crimes were defined by state law. See, 1 Stat. 138 Sec. 5. The acts made further provision for forfeiture and penalties for taking property from Indian lands. 2 Stat. 141, Sec. 4.

In 1817 Congress expanded the reach of the Act beyond crimes by non-Indians against Indians to reach

crimes by any person within Indian territory which if committed under the sole and exclusive jurisdiction of the United States would be punished by the laws of the United States, ". . . provided that nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary." Act of March 3, 1817, 3 Stat. 383. Section 2 of the 1817 Act vested jurisdiction over offenses in the Superior Courts of the territory and other courts of the United States with similar jurisdiction in criminal causes. *Id.*

One of the principal enforcement mechanisms for the Trade and Intercourse Acts consisted of military troops, not Indians. It was the military who apprehended persons who were in Indian country illegally, and the troops conveyed them immediately by the nearest convenient and safe route to the civil authority of United States and the adjoining state or territory to be tried. Prucha, American Indian Policy in the Formative Years, page 62 (1962).

These early versions of the Trade and Intercourse Acts established the pattern of federal jurisdiction over interracial crimes, that is, crimes involving non-Indians were tried exclusively by federal courts. Only intratribal matters were left to the Indians. See, Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 526-527. Allowing Indians jurisdiction only as to matters between tribal members is consistent with the notion of self-government described herein.

In 1832, Congress considered three bills intended to (1) reorganize the Indian Department, (2) establish a new Trade and Intercourse Act, and (3) organize a

Western Territory for the use of Indians who had migrated to the west. At the time these bills were considered, "it was the policy of the United States to isolate the tribes on territory of their own beyond the Mississippi, where they were quite free to govern themselves." *Kake, supra* at 71. This policy has been reversed, and Indians are now part of the nation. *Id.*, at 72. While the committees considering this legislation urged that the bills were part of a system and should be passed together, Congress refused to pass all three bills.

The first bill reorganized and economized the Indian Department, placing added responsibilities on the military officers on the frontier. Prucha, American Indian Policy in the Formative Years: The Trade and Intercourse Acts 1790-1834, at 259-261 (1962). None of its provisions provides support for the conclusion that Congress intended to allow tribes jurisdiction over non-Indians. The second bill defined Indian country, licensed traders therein and restricted and regulated non-Indian activities in Indian country. *Prucha, supra,* at 261-269.

No provision of the Trade and Intercourse Act demands or implies that tribes be allowed or granted jurisdiction over non-Indians. Section 25 (4 Stat. 729, 733), provided for the application to Indian country of laws applying in areas within the exclusive jurisdiction of the United States. One of these laws is the Assimilative Crimes Act, 18 USC Section 13. That act incorporates state criminal law into the federal criminal code, applies it to federal enclaves, and keeps a federal forum for the trial of such crimes.

Section 9 of the Western Territory Bill was intended to confer on tribes criminal jurisdiction over non-

Indians. H. Rep. No. 474, 23rd Cong., First Sess., June 20, 1834, pages 36 and 37. While the Commissioner of Indian Affairs West and the Commission on Indian Affairs supported the Western Territory Bill, it was ultimately rejected by Congress.

The Western Territory Bill established a voluntary confederation of tribes which it was hoped would send a delegate to Congress and eventually be admitted as states into the Union. Prucha, American Indian Policy, at 270, 272. The Western Territory Bill was severely criticized. John Quincy Adams assailed it, asking what constitutional right had the United States to form a constitution and formal government for Indians. Adams also pointed out that the admission of an exclusively Indian state to the Union was a seminal idea, and might set a dangerous precedent. The bill was introduced late in the session just prior to adjournment and Mr. Adams asked: "Was the house prepared . . . upon a half-hours notice totally to change the relations of the Indian tribes of this country?" See, Prucha, American Indian Policy at 270-273.

John Quincy Adams also understood the Western Territory Bill to establish a double jurisdiction, that is, jurisdiction by both tribal and federal courts over a person's activities. The existence of this double jurisdiction was one of the very reasons given for the ultimate rejection of the Western Territory Bill. Register of Debates, Volume 10, Part 4, 23rd Cong., First Sess., page 4771 (1834). The bill was also rejected because it left too much power in the President's hands and established a government solely for Indians. *Id.*

The potential for double jeopardy was further recognized by Congress in adopting the 1834 Act:

> In consequence of the change in our Indian relations, the law relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the Act of 3rd March, 1817, the criminal laws of the United States were extended to all persons in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties and of the Territorial Act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian Law in the early stages of their government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits.

Although the report is in error as to the effect of the laws of 1817, since crimes by any person were covered by that act, and only crimes between Indians were exempted, the above quotation reflects their concern over the constitutionality of their assertion of jurisdiction over Indians. *Worcester* v. *Georgia* had only been decided two years prior to this time. Despite Congress' fears of the unconstitutionality of its action, and because it did not trust Indian law in the early stages of government, congress took jurisdiction over crimes by and against Indians.

Except as amended in 1854, the 1834 Act remains the same today as it was in 1834.

In 1854 Congress' concern with double jurisdiction resulted in an amendment to Section 25 of the Trade and Intercourse Act. That amendment exempted from the provisions of Section 25 any Indian committing an offense in Indian country who had already been punished by the local law of the tribe. Act of March 27, 1854, 10 Stat. 269. The amendment was intended to extend double jeopardy protections only to Indians, and it was so stated in Congress. Congressional Globe, Volume 32, 33rd Congress, page 701 (March 21, 1854). There was no indication when the amendment was adopted that the Section applied to non-Indians, thereby raising the inference that non-Indians were not subject to the tribal jurisdiction asserted prior to the amendment of Section 25 of the 1834 Trade and Intercourse Act.

In 1834, the Attorney General of the United States similarly interpreted Section 25 of the 1834 Act as excluding criminal jurisdiction by tribes over non-Indians: 2 Opinion Attorney General, 693, 695:

> . . . the 25th Section of the Act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be enforced in Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another. Thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

In 1855, the Attorney General of the United States again arrived at the same conclusion. 7 Opinion Attorney General 174, 179 (1855).

Historically, the Department of Interior has taken the position that Indian tribal governments lack criminal jurisdiction over non-Indians.

In 1883, the Secretary of Interior issued regulations for courts of Indian offenses. At that time, and as recently as 1976, the Department of Interior has taken the position that the court of Indian offenses has jurisdiction only over offenses "committed by any Indian, within the reservation or reservations for which the court has been established." 55 I.D. 401-421 (1934); 25 CFR Section 11.2 (1976).

In 1939 the Interior Department took the position that tribal courts do not have jurisdiction over non-Indians. See, Administrative Ruling of Solicitor of Interior Department, April 27, 1939, as quoted in Cohen, Federal Indian Law (1942) at 359, 360-361.

As of August 10, 1970, the Department of Interior still took the position that Indian tribal government had no criminal jurisdiction powers over non-Indians. 77 I.D. 113, 115 (1970); cited with approval in 78 Id. 229, 230 (1970).[40] However, even though the *Kenyon* decision and the Attorney General opinion of 1855 suggest that Indian tribes do not have jurisdiction over Indians who commit offenses against non-Indians, in 1970 the Department of Interior took the position that the practice and interpretation of 18 USC Section 1152

[40] Although the opinion was withdrawn on January 25, 1974, an inconsistent position has not been published. A similar position was taken in the 1958 Edition of Federal Indian Law, at 451.

has been to recognize the jurisdiction of tribes over offenses by tribal members, at least against non-Indians. See, 77 I.D. at 114, n. 2.[41]

IV.

THE HISTORICAL APPLICATION OF THE MAJOR CRIMES ACT IS CONSISTENT WITH THE CONGRESSIONAL POLICY OF LIMITING TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

Congressional, judicial, and tribal treatment of the Major Crimes Act are consistent with the limitation of tribal powers of self-government to jurisdiction over Indians. The Trade and Intercourse Act does not apply to crimes committed between Indians. 18 USC Section 1152 (1970). The fact that the Trade and Intercourse Act excepts from the application of its provisions intratribal matters is further evidence of Congress' consistent policy of limiting tribal powers of self-government to jurisdiction over Indians. The Major Crimes Act, 18 USC Section 1153 (1970), precludes tribes from exercising criminal jurisdiction over major crimes. It is difficult to understand how Congress would preclude tribes from exercising jurisdic-

[41] A February 24, 1975, statement from Reid Peyton Chambers, Associate Solicitor of Indian Affairs, Department of Interior, was submitted into Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs of the United States Senate, on S. 2010. Indian Law Enforcement Improvement Act of 1975. Mr. Chambers stated: "The Department of Interior has withdrawn an earlier opinion of the solicitor holding that no tribes have any criminal jurisdiction over nonmembers. This subject is under ongoing review within the Department and will be carefully assessed as the law develops and becomes clear in this area. At the present time I do not believe that the Department is prepared to support tribal criminal jurisdiction over non-Indians on land within open portions of reservation." Page 633.

tion over major crimes committed by Indians, but allow tribes to exercise jurisdiction over non-Indians for the same major crimes.

In 1874 a predecessor of the Federal Major Crimes Act was rejected because it conflicted with the exercise of tribal jurisdiction:

> The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation. S. Rep. No. 367, 43rd Congress, First Session (1874), page 2, as quoted in *Cohen,* Federal Indian Law, (1942) at 147, n. 222.

In *Ex Parte Crow Dog,* 109 U.S. 556 (1883), the Supreme Court ordered the release of an Indian convicted in federal court of killing another Indian. The Supreme Court held that under the language of the treaty in question, the tribe was to retain exclusive power over punishment of criminal actions. In response to this ruling, Congress passed a bill to require that trials for certain specified major crimes take place in federal court.

Unlike the amended provisions of Section 25 of the 1834 Act, the Major Crimes Act did not immunize Indians who had already been tried and punished by tribal authorities from further prosecution by the United States over its territories. The Act implicitly repealed tribal jurisdiction over the serious offenses which it covered. See, *United States* v. *Cardish,* 145 Fed. 242 (1906) and *United States* v. *Whaley,* 37 Fed. 145 (1888). While an amendment was proposed to

allow tribal jurisdiction over intratribal offenses, see, Amendment of Congressman Budd, 16 Cong. Rec. 934 (1885), there was no debate on the proposed amendment. Discussion revolved primarily around the control of liquor on the reservations and appropriations for the purchase of Indian land. 16 Cong. Rec. 22 et seq.

Despite the prior legislative history, the extent of federal involvement in the area of criminal jurisdiction has preempted jurisdiction in the tribe over such crimes.[42] More recently, federal courts have found that the Major Crimes Act excludes tribal jurisdiction. *Sam* v. *United States,* 385 F.2d 213, 214 (10th Cir. 1967); see, *Felicia* v. *United States,* 495 F.2d 353, 354 (8th Cir.) cert. den. 419 U.S. 849 (1974).

The Interior Department has treated the Major Crimes Act as excluding tribal jurisdiction. 65 I.D. 14, 66. See, *Cohen,* Federal Indian Law (1942) at 449.

Furthermore, the 1968 Indian Civil Rights Act limited the jurisdiction of Indian courts by limiting penalties to imprisonment for a term of 6 months or a fine of $500.00. Public Law 90-284, 82 Stat. 77, 25 USC 1302.

As a matter of practice, Indian tribes have not asserted jurisdiction under the Major Crimes Act. Even a member of the law firm representing the Suquamish has admitted to Congress that he is aware of no at-

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[42] *Cohen,* Federal Indian Law (1942) at 449. By adopting the Major Crimes Act, "Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by an Indian against another on Indian land. Other offenses remain matters for the tribe." *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 72 (1962).

tempt by Indian tribes to prosecute major crimes. Hearings on S. 1400 Before Subcommittee on Criminal Laws and Procedures of Senate, Judiciary Committee, 93rd Cong., 1st Sess., Part VII, page 5894 (1973). On another occasion a member of the same law firm has declared that he is unaware of any tribe which is interested in enforcing the Major Crimes Act. That same individual indicated that the expense is inappropriate and the federal government or state can do a better job on those kinds of cases. Hearings on the Indian Law Enforcement Improvement Act of 1975, Before Subcommittee on Indian Affairs of Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess., page 118.[43,44]

V.

PASSAGE OF THE INDIAN REORGANIZATION ACT OF 1934 WAS CONSISTENT WITH THE CONGRESSIONAL POLICY OF LIMITING TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

With the incorporation of Indians into our political system as citizens, Act of June 2, 1924, 43 Stat. 253, the Indian Reorganization Act was a logical step to bring fuller participation to Indians in our constitutional scheme. If Indians were not part of the sov-

[43] Since tribal courts are arms of the federal government, for purposes of double jeopardy, prosecution in tribal court is precluded once the federal government has acted. *United States* v. *Wheeler*, 545 F.2d 1255 (1976); see, *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965).

[44] The legislative history behind 18 USC 1165, a statute prohibiting trespass on Indian land for hunting or fishing, reveals Congress' belief in 1960 that tribes lacked jurisdiction over non-Indians. See, S. Rep. No. 1686, 86th Cong., 2nd Sess. 2-3 (1960) and discussion in Judge Kennedy's dissent in *Oliphant* (A. 72-73).

ereign prior to 1924, they most certainly became part of the sovereignty by that act of citizenship. Johnson, Sovereignty, Citizenship and the Indian, 15 Ariz. L. Rev. 973, 996-7 (1973). No extra constitutional source of sovereign powers for Indian self-government could be admitted once Indians became citizens.

The Indian Reorganization Act was not intended to recognize or confirm self-government by Indian tribes on the basis of inherent sovereign rights. See, Schaab, Indian Industrial Development and the Courts, 8 Nat. Res. Jl. 303, 309-312. It was intended to stabilize tribal organizations and to allow them the use of modern business organizations. *Id.*, citing language of Senate Committee Report. The entire discussion of the Indian Reorganization Act in both houses took place in terms of granting new rights to Indian tribes. See, for example, Statements of Senator Wheeler, 78 Cong. Rec. 11124 (1934); Statement of Senator Ayers, 78 Cong. Rec. 12164 (1934). By accepting the Act, individual tribes could exercise limited rights of self-government under a tribal constitution approved by the secretary. 25 USC Section 476 (1970) The Suquamish adopted their tribal constitution under the Act. (R. 54, Exh. 7) Certain regulations of the Department of Interior apply to and limit the power of tribal governments constituted under the Indian Reorganization Act.[45] Tribal government organized under the acts is a creation of Congress. It derives its power from congress and can exercise only such powers as Congress has provided. See, *Schaab, supra* at 310-311, n. 28.

Tribal courts are for all practical purposes arms of the federal government. In *Colliflower* v. *Gar-*

[45] See, 25 C.F.R. Sec. 11.1(d) (1976).

land, 342 F.2d 369 (9th Cir., 1965), the Ninth Circuit held that Federal District Courts had the jurisdiction to issue writs of habeas corpus to determine the validity of tribal court decisions. The court reviewed the history of tribal courts, including the passage of the Indian Reorganization Act of 1934. While the court limited its holding to the court before it, a court of Indian offenses, there is little qualitative difference between the functions of courts of Indian offenses and tribal courts. See, DeRaismes, 20 S.D. L. Rev. 59, 71 n. 45. See, *Settler* v. *Yakima Tribal Court,* 419 F.2d 486 (9th Cir. 1969). In a more recent case, *United States* v. *Wheeler,* 545 F.2d 1255 (9th Cir., 1976), the same court considered whether tribal and federal courts could both prosecute an individual for the same activities. The *Wheeler* case involved a tribal court, not a Court of Indian Offenses. Nevertheless, the Ninth Circuit held that tribal courts are arms of the federal government for purposes of doouble jeopardy, and prosecutions for the same offense cannot be allowed in both the tribal court and federal court. 545 F.2d 1258.

VI.

THE PASSAGE OF PUBLIC LAW 280 IS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

By enacting Public Law 280, the federal government authorized states to assume criminal jurisdiction exclusive of Indian tribal jurisdiction. Act of August 15, 1953, 67 Stat. 588, partially codified in 18 USC Section 1162 (1970), 28 USC Section 1360 (1970). The legislative history of Public Law 280 does not plainly state whether that act was intended to confer jurisdiction

over non-Indians on to states. To the extent that Public Law 280 addresses only the imposition of jurisdiction over Indians by state government, it is further evidence that tribes had never been given jurisdiction over non-Indians. To the extent that tribes had been allowed some jurisdiction over non-Indians in the past, see, 77 I.D. 113, 114, n. 2, and to the extent that Public Law 280 confers jurisdiction over Indian and non-Indian alike to the exclusion of tribal courts, it is further evidence of the lack of jurisdiction in tribal courts over non-Indians. Finally, to the extent that Federal jurisdiction has preempted the exercise of State jurisdiction over non-Indians, removal of that federal jurisdiction reimposes State jurisdiction over Indian and non-Indian alike, regardless of the existence or non-existence of an enabling provision. See, *Anderson* v. *Gladden,* 188 F.Supp. 666, aff'd., 293 F.2d 463 (9th Cir., 1961), c.d. 368 U.S. 949 (1961) and *Anderson* v. *Britton,* 212 Or. 1, 318 P.2d 291 (Ore. Sup. Ct. 1957).

The legislative history reveals that at a minimum Public Law 280 was designed to cure law enforcement problems occurring among Indians in Indian country:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many states, tribes are not adequately organized to perform that function; consequently, there has been a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on states indicating an ability or willingness to accept such responsibility. House Report No. 848, 1953 U.S. Code, Cong. Adm. News. 2411-2412.

As recently as 1975, an assistant solicitor for the Department of Interior has indicated that in his opinion Public Law 280 did not affect tribal jurisdiction over non-Indians. See, Statement of Mr. Chambers, Hearings on 1975 Indian Law Enforcement Improvement Act, *infra* at page 64.

A. Public Law 280 Authorized The State of Washington To Assume Criminal Jurisdiction, Exclusive Of Indian Tribal Jurisdiction, Over The Port Madison Reservation.

In *U.S.* v. *Burland,* 441 F.2d 1199, 1202 (1971), the court concluded that Public Law 280 was intended to substitute state for federal jurisdiction on a geographic and subject matter basis rather than in terms of persons. There is support in the legislation's language and history for that conclusion. *Id.* at 1202.

The State of Washington assumed jurisdiction over Indians in Indian reservations through Section 6 of Public Law 280. *Quinalt Tribe of Indians* v. *Gallagher,* 368 F.2d 648 (9th Cir., 1966). Public Law 280 gave the consent of the United States to States such as Washington ". . . to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this act . . ." 67 Stat. 588.

Section 7 of Public Law 280 gave the consent of the United States to other States ". . . not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction . . . by affirmative legislative action . . ." 67 Stat. 588.

The purpose behind enacting Sections 6 and 7 was to allow states with laws expressly disclaiming jurisdictions to amend those laws to obtain jurisdiction by subsequent enactment. The language of Sections 6 and 7, which authorized optional assumption of jurisdiction, speaks in terms of the United States consenting to a state's acceptance of civil and criminal jurisdiction "in accordance with the provisions of this Act" (Section 6) and "as provided for in this act" (Section 7). This language suggests that optional states were to assume as much jurisdiction as the mandatory states. See, Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 548 (1975). Clinton, Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Arizona L. Rev. 503 (1976).

Mandatory states obtain jurisdiction over Indians and Indian reservations through Section 2(a) of Public Law 280, codified as 18 USC Section 1162(a). Section 2(a) gives jurisdiction to States over offenses committed by or against Indians in Indian country ". . . to the same extent that such state . . . has jurisdiction over offenses committed elsewhere within the state . . ." There is no indication in the legislative history that states assuming jurisdiction under Section 6 and 7 were to receive any less jurisdiction than those receiving it under Section 2(a), therefore the provisions and subsequent history of Section 2(a) is relevant to resolve issues involving Section 6 and 7. Furthermore, statutory provisions which are part of the same act are regarded in pari materia and should be construed in their entirety. 73 Am.Jur.2d Statutes, Sections 187-191.

Section 2(c), 18 USC 1162(c) provides that the Trade and Intercourse Act, 18 USC Section 1152 and the Major Crimes Act, 18 USC Section 1153, shall not apply in the mandatory states. The clear implication

of the language of Section 6 and 7 is that the jurisdictional opportunities afforded discretionary states be the same exclusive state jurisdictional structure provided for the mandatory states.[46] Section 1321 appears to afford the same opportunities to states, now only with tribal consent, to assume complete criminal jurisdiction over Indian lands exclusive of federal jurisdiction under Section 1152 and 1153.

Further evidence of Congress' intent to grant state jurisdiction exclusive of the Indian tribes can be found in 1970 amendments to 18 USC Section 1162. Section 1162 was amended to allow one Indian community jurisdiction over intratribal offense and to establish which states have assumed exclusive jurisdiction under Public Law 280.

In 1958 Public Law 280 was extended to Alaska Indians by Public Law 615. Section 1162 had provided that Alaska had jurisdiction over all Indian country within the territory. Prior to 1958, the Metlakatla Indians had a system of courts and police which enabled them to exercise jurisdiction over minor Indian offenses. The 1958 act had the effect of ". . . eliminating the legal basis for the jurisdiction exercised by the community over minor offenses." H. Rep. No. 91-1545, as reported in 1970 U.S. Code Cong. Admin. News 4784. The 1970 amendment was passed to allow the Metlakatla Indian community ". . . to exercise jurisdiction over minor offenses concurrent with the State of Alaska." *Id.*, at 4783. Both the Interior De-

[46] Section 7 was later technically repealed and replaced by 25 USC Section 1321 of the Indian Civil Rights Acts. The alteration of the language in Section 1321 was not designed to change the jurisdictional outcome.

partment and the United States Attorney General's Office stated that the tribe's concurrent jurisdiction would be limited to jurisdiction over its own members. *Id.*, at 4787.

Congress and the Metlakatla Tribe concluded that Public Law 280 abolished tribal jurisdiction over misdemeanors committed by tribal members and gave such exclusive jurisdiction to the states. Therefore, Indian powers of self-government in criminal matters were eliminated in mandatory Public Law 280 states. To the extent that optional states were offered jurisdiction coextensive with that offered mandatory states, optional states received jurisdiction exclusive of Indian tribes. In the opinion of the Washington State Attorney General, to the extent that State of Washington assumed criminal and civil jurisdiction under RCW 37.12, Laws of 1963, that jurisdiction is exclusive of tribal jurisdiction. A.G.O. 63-64 No. 68, November 8, 1963."[47]

Further evidence that Public Law 280 states the opportunity to assume jurisdiction exclusive of Indian tribes can be found in language added to 18 USC Section 1162 in 1970. Prior to 1970, 18 USC Section 1162 provided: "The provisions of Sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section." In 1970 that section was amended to read: "The

[47] In that opinion at page 12, the Attorney General refers to the attempt by several of the Indian tribes through their tribal attorneys to convince a legislative council sponsoring the state act in question that the bill should be amended to allow concurrent jurisdiction on the part of Indian tribes. Members of the council refused to so amend the bill, nor was any such amendment introduced in the legislature prior to enactment into law.

provisions of Section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in Section (a) of this section as areas over which several states have exclusive jurisdiction." The purpose of this amendment was not to create a new form of jurisdiction, but rather to make explicit that which was implicit under the Act;[46] that is, where state jurisdiction is exercised, that jurisdiction is exclusive.

The Department of Interior agrees with the State of Washington that Public Law 280 conferred jurisdiction exclusive of tribal jurisdiction upon the states. Solicitors Opinion M-36241, September 22, 1954. See, Letter of Secretary of Interior Lewis of June 4, 1954. In his letter, Secretary Lewis concluded that the effect of the language stating that criminal law shall have the same force and effect within Indian country as elsewhere within the state, gives the state full and complete jurisdiction and permits no such jurisdiction by any other body save the federal government and subordinate agencies of the State itself. *Id.*

Both state and federal courts have concluded that Public Law 280 confers exclusive jurisdiction on state governments. *Anderson* v. *Gladden,* 188 F. Supp. 666, 676, aff'd., 293 F.2d 462, 466 (9th Cir. 1961), cert. den. 368 U.S. 949 (1961); *Robinson* v. *Sigler,* 187 N.W.2d 756, 759, 187 Neb. 144 (1971); *Confederated Bands and*

[46] The new language was "... descriptive only, and is not meant to change the meaning of section 1162(c). It was added because subsection (c) refers to the Indian country listed in subsection (a) and that list includes Indian country not under state jurisdiction as well as areas that are..." Letter to Chairman, House Judiciary Committee from Senator Sleves, Grovel and Ervin, Members of the Senate Committee on the Judiciary, October 14, 1970, appearing in Congressional Record of November 16, 1970 at 37354.

Tribes of Yakima Indian Nation v. *State of Washington,* District No. 2732 (E.D. Wash., 1972), aff'd., 550 F.2d 443 (1977), however, Public Law 280 was held to unconstitutionally deny equal protection of the law in a remand in the same case before the Ninth Circuit. See, —— F.2d ——, No. 74-1225, April 29, 1977.

In 1953 the United States Congress passed legislation permitting states to assume criminal and civil jurisdiction over Indians and Indian reservations. In 1957, pursuant to that act, the State of Washington enacted legislation permitting the Suquamish Indian Tribe, among others, to cede criminal and civil jurisdiction over the tribe and its reservation to the state. RCW 37.12.020-070. In 1959, the Suquamish Indian Tribe ceded said jurisdiction to the state.

In 1963 new legislation which did not require the consent of Indian Tribes, obligated the State of Washington to assume criminal and civil jurisdiction over Indians and Indian reservations. RCW 37.12.010-070. In a proclamation dated August 26, 1971, Governor Evans returned the jurisdiction assumed by the State of Washington under the 1957 act to the Suquamish Indian Tribe (Belgrade, R. 78, Exh. E). However, the jurisdiction was held to be valid by both state, *Makah Tribe* v. *State,* 76 Wn.2d 645, 457 P.2d 590 (1969) and federal courts. *Quinalt Tribe* v. *Gallagher,* 368 F.2d 648 (9th Cir., 1966), cert. den. 387 U.S. 907.

The 1963 act established criminal and civil jurisdiction over Indians and Indian reservations within this state. That statute expressly provided that such assumption of jurisdiction "... shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the

United States or subject to a restriction against alienation imposed by the United States." RCW 37.12.010. However, the act applies even to Indians when on their tribal or allotted lands in eight subject matter areas: Compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and "... operation of motor vehicles upon the public streets, alleys, roads and highways."

Since the State Act exempts from its assumed jurisdiction only Indians when on tribal or allotted lands, the tribe had no power over Oliphant. The state took exclusive jurisdiction over Oliphant's crime through RCW 37.12.010. Of course, to the extent the tribe never had jurisdiction over Oliphant, Public Law 280 is not determinative. State jurisdiction is appropriate and has been exercised.

RCW 37.12.010(8), provides for exclusive state jurisdiction on public highways, whether Indians or non-Indians are involved. See, A.G.O. 63-64 No. 68—Bel garde was involved in the operation of his motor vehicle on the public highways of the state of Washington, roads maintained by the Kitsap County Road Department, (Belgarde R. 78, Exh. A). Insofar as Public Law 280, and the state enactment thereunder, provide exclusive jurisdiction, tribal court jurisdiction does not exist over public highways. Furthermore, the Suquamish Tribal Code provides for no vehicle code violations. This is an appropriate area for enforcement of the laws of the State of Washington by and through the Kitsap County Prosecutor's Office. This writer is personally familiar with numerous cases arising on the roads of the reservation and prosecuted in district

court. Furthermore, tribal courts have not been exercising traffic jurisdiction over non-Indian residents of the reservation. See, n. 36, 38, *supra.*

VII.

THE PASSAGE OF THE INDIAN CIVIL RIGHTS ACT OF 1968 IS CONSISTENT WITH THE LIMITATIONS OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

In 1968 Congress passed the Indian Civil Rights Act, Act of April 11, 1968, 25 USC 1301-1341. The act imposed certain due process requirements upon tribal courts handling any person subject to the tribal power of self-government. 25 USC 1302. The act further limited the punishment that may be imposed by tribal courts to a term of six months imprisonment or a fine of $500.00 or both. The fact that the act extended constitutional safeguards to all persons, rather than to Indians alone, is not a grant of tribal jurisdiction over non-Indians in criminal matters.

The Indian Bill of Rights protects more than substantive and procedural criminal rights. In *Dodge* v. *Nakai,* 298 F. Supp. 26 (D.Ariz. 1969), non-members of the Navaho tribe and director of the legal services program serving the people of the Navaho reservation became involved in a dispute with a member of a tribal committee. As a result of Mitchell's conflict with members of the tribe, the tribal council passed a resolution removing him from the reservation. The tribe's only justification for such removal was obnoxious conduct consisting of a laugh interpreted to be scornful by a tribal committee, and so obnoxious as to provoke an assault by a tribal member upon him. The district court held that under 25 USC 1302 (8) the tribe

had deprived Mitchell of liberty or property without due process of law. The court concluded that the order of exclusion constituted an unlawful bill of attainder as well. 298 F. Supp. 26.

In *Dodge,* the court refers to the legislative history of the Indian Civil Rights Act as a justification for its conclusion that the act was intended to protect Indian and non-Indian alike. Hearings on Constitutional Rights on American Indians Before Subcommittee on Constitutional Rights, Senate Judiciary Committee, 89 Cong. First Sess., page 189, 260-7. (1965). However, the portions of legislative history just cited and relied upon by the court do not deal with criminal matters involving non-Indians. Those references reveal the difficulties non-Indian creditors, bankers and rentors have in collecting their bills and rents; as well as problems of free speech and religious freedom among tribal residents of an Indian reservation.

The Indian Civil Rights Act grew out of a desire in Congress to limit the unchecked authority of tribes over Indian members. Congressmen were astounded to discover that reservation Indians did not possess constitutional rights conferred on other Americans by the Bill of Rights. See, Cong. Rec. 35472-35473, December 7, 1967.

Even the language of the Act implies a limited jurisdiction in the tribes; 25 USC Section 1302 prohibits the denial of certain rights by an Indian tribe "... exercising powers of self-government."

Supporters of the Indian Civil Rights Act consistently refer to the Act as a measure limiting tribal court power in dealing with tribal members. See, Remarks of Representative Reifle, 114 Cong. Rec. 9552-53

(April 10, 1968); Remarks of Senator Ervin, 113 Cong. Rec. 13473 (May 23, 1967). Further evidence that congress considered tribal powers to be limited to jurisdiction over non-Indians can be found in a Solicitor's Memorandum submitted in Hearings on Constitutional Rights of American Indians Before Subcommittee on Constitutional Rights of Senate Judiciary Committee, 87th Part I-III, 88th Cong. Part IV, 1961-1964. These hearings resulted in the passage of the Indian Civil Rights Act of 1968. The Solicitor's Memorandum regarded jurisdiction of the tribal court and courts of Indian offenses over unrestricted lands. Memo. Sol. I.D., April 27, 1939. On page 263 of those hearings the nature of tribal court authority is noted to be personal, rather than territorial, in nature. The opinion concludes that "... the tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely the jurisdiction over persons."

During the course of the hearings Congress proceeded on the assumption that tribal courts lacked jurisdiction over non-Indians. In the 1964 Summary Report of Hearings and Investigations of Constitutional Rights of the American Indian (1964), the Committee considering the Indian Civil Rights Act concluded that state or federal courts may assume jurisdiction to try offenses lesser than the Major Crimes Act when committed by non-Indians against Indians. The committee also made reference to the testimony of a judge of the Hualapai Tribe in which she indicated that a non-member of the Hualapai Tribe could not be tried in the tribal court since that court lacked the power to try a non-member. *Id.* at page 8. See, Statement of the President of Rosebud Sioux Tribe, Cato

Valandra, in the 1961-64 hearings, *supra* at pages 679-80. Tribal courts as a practical matter have not claimed jurisdiction over non-Indians in the past. Justice and the American Indian, National American Indian Court Judges Assn., Volume 4, page 4 (1974). See, n. 36, *supra*. Therefore, the writ of habeas corpus exists primarily as a remedy for individuals over whom tribes illegally attempt to take jurisdiction. See, *Dodge* v. *Nakai, supra*.

It is inappropriate to extend the jurisdiction of tribal courts to non-Indians. Article 3 courts have complex procedural systems designed to show correct and fair decision making. They allow appellate review to assure uniformity in decision making and minimize the possibilty of bias or error in individual cases. However, Indian tribal courts have very few of these complex assurances of fairness and accuracy in decision making. Few tribal judges are trained in the law of the states and of the United States, and few tribes have effective systems of appellate review. Appellate decisions are apparently not published. See, American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977.

The Indian Civil Rights Act of 1968 provides only limited review in federal courts insofar as tribal decisions impinge on minimal constitutional guarantees. There is no review in federal court for decisions of Indians courts when the tribal court decisions are merely erroneous unless the error reaches constitutional magnitude. Furthermore, the Indian Civil Rights Act does not guarantee counsel at public expense when a defendant does not have sufficient funds to hire his own counsel, and does not prevent the establishment of a state religion in an Indian tribe. It

does not assure non-Indian citizens of the right to grand jury indictment in certain cases and a jury trial in cases other than those for which imprisonment will follow. Furthermore, many courts have applied these basic portions of the Bill of Rights included in the Indian and Civil Rights Act in a watered down fashion to allow for consideration of Indian cultural factors.[49] Congress has determined that this dilution is appropriate to preserve Indian culture, and the American Indians have consented. No such justification exists for the dilution of the constitutional rights of non-Indians.

CONCLUSION

The petition for writ of habeas corpus should issue to discharge Oliphant and Belgarde from the custody of the Suquamish Tribe.

Respectfully submitted,

CARMON DANNY CLEM
Prosecuting Attorney

PAUL S. MAJKUT
Deputy Prosecuting Attorney

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[49] See, n. 39, *supra*.

APPENDIX

APPENDIX

(SEAL)
Kitsap County
614 Division Street
Port Orchard, WA 98366
Area Code 206, Tel. TR 6-4441

BOARD OF COMMISSIONERS
Frank Randall, District 1
William H. Mahan, District 2
Gene Lobe, District 3

August 6, 1974

The President, Richard M. Nixon
The White House
Washington, D.C.

My Dear Mr. President:

Enclosed you will find petitions filed by some 750 persons which constitutes nearly all the permanent residents within the historic boundaries of the Port Madison Indian Reservation.

The Board of Commissioners is acting as forwarding agent for these petitions because of our complete agreement with the concerns and the ideals enunciated on the petitions as well as our concern about the rather tense situation that is developing here in this county. We feel very strongly that if the Indians' objectives were carried out it would constitute a flagrant example of government without representation. There are, according to our records, approximately 50 members of the Port Madison Tribe residing within the historic boundaries (23 of them, incidentally, have signed the enclosed petitions) and to have this small handful of persons acting as a government for some 2,000 non-Indian landowners, one of whom have the right to elect anyone to the Tribal Council or to have any say about their representation would be, we believe, clearly unconstitutional.

We recognize there are many Reservations with many degrees and types of problems but we firmly believe that in this instance what these people are asking for is right and proper.

The delay in forwarding these was brought about by the Board of Commissioners because of some rather delicate negotiations with the Suquamish Tribal Council regarding a sewerage system for the community of Suquamish. The Board did not want to "rock the boat". Those negotiations now have, however, broken down completely and so we are therefore forwarding these petitions on to you.

Please let us know if we can answer any questions.

Very Sincerely Yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

/s/ GENE LOBE
Gene Lobe, *Chairman*

/s/ WILLIAM H. MAHAN
William H. Mahan, *Commissioner*

/s/ FRANK RANDALL
Frank Randall, *Commissioner*

FR:pb

Enclosures

Copy to:
Senator Magnuson
Senator Jackson
Senator Abourezk
Congressman Meeds
Mrs. Ky Dewar
Mr. Travis Baker
President Gerald Ford 8/28/74

The present Suquamish Indian Tribal government in Kitsap County, Washington, is claiming jurisdiction over the property and persons of all residents living within the original exterior boundaries of the Port Madison Indian Reservation. Therefore the undersigned persons who own property, or reside within these boundaries, petition the President and the Congress of the United States to uphold the validity of our patent, or fee simple lands; and to be relieved of the claims of the present Suquamish Tribal government that all residents in this area are under their jurisdiction and shall be governed by them without representation. These patent lands were originally purchased from Indian allotted lands, and there is nothing in the original abstracts that reserves the right of jurisdiction over the new owners, by the Suquamish Indians.

We respect the Indian right to govern themselves, if that be their wish, but we also ask that our rights be protected by allowing us to maintain our status as citizens of Kitsap County, the State of Washington, and the United States of America. No Tribal government of the Suquamish, until the present one, has insisted on sovereignty rights over the non-Suquamish Indian population.

We therefore, in the interests of the peace and welfare of all citizens living in this area, do petition that the patent lands be deleted from the original boundaries of this reservation, and that this area be recognized for what it presently *is:* approximately 2600 acres of allotted lands owned by individual Indians and lived on by 50 members of the Suquamish Lndian Tribe; approximately 4700 acres of fee simple land lived on by 2928 non-members of the Suquamish Tribe; and 36 acres of tribal land, leased for 50 years to non-Indians.

NAME	ADDRESS	DATE

(SEAL)
Kitsap County
614 Division Street
Port Trchard, WA 98366
Area Code 206, Tel. TR 6-4441

BOARD OF COMMISSIONERS
Frank Randall, District 1
William H. Mahan, District 2
Gene Lobe, District 3

August 29, 1975

The President, Gerald Ford
The White House
Washington, D.C.

My Dear Mr. President:

The enclosed letter and copy of petition were sent to you by this office a year ago. At the present time no response has been received. The situation that occasioned the petition has become even more critical with the Federal Court decision last week that the Indian Tribe has concurrent police jurisdiction with the state within the entire historic boundaries of the reservation. Bear in mind that two-thirds of the Indian lands have been sold and are now fee-patent land under non-Indian ownership. The courts of our land seem to be of no help and we firmly believe it will take congressional action to rectify this inequitable situation.

Copies of the entire 750 names are on file in this office. If you desire, we will forward them on to you.

Very sincerely yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

/s/ GENE LOBE
Gene Lobe, *Chairman*

/s/ WILLIAM H. MAHAN
William H. Mahan, *Commissioner*

/s/ FRANK RANDALL
Frank Randall, *Commissioner*

FR:pb

Enclosures

cc: Senator Magnuson, Senator Jackson, Senator Abourezk, Congressman Meeds, Mrs. Ky Dewar, Congressman Joel Pritchard.

ERRATA SHEET

Page	Line	Change
4		Footnote 1, after "July 20, 1977" insert ", July 12, 1977."
5	19	After "33 Stat. 1048" insert ", 1078."
26	3	After "Cranch)" insert "87, 142-143."
26	32	Strike "20" insert "17"
27	2	After "Id" insert ", at 20."
27	13	After "Id" insert "at 17."
29	24	The last sentence of the quotation beginning on line 24 is textual and not part of the quotation.
29	30	After "unconstitutional:" insert "Id. at 593." After "state." insert "Id. at 594."
33	30	After "enactments." insert "Id. at 539."
34	11	After "164" insert "172."
35	31	After "Argument I, page" strike "15, 16, 18," and insert "25-27,"
49	6	Strike "22" and insert "922"
59	3	After "however," insert "RCW 37.12, the implementing legislation under"
59	23	After "However, the" insert "jurisdiction assumed under the 1963 Act was expressly saved. Id. The 1963 assumption of"
59	25	Strike "645" and insert "485"
64	5	Strike "36" and insert "37"